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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1972

No. 72-800

PHILIP JOSEPH MAITA and JOHN MCRAE, *Petitioners*

vs.

ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD of the STATE OF CALIFORNIA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI
to the Supreme Court of the State of California

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No.

PHILIP JOSEPH MAITA and JOHN MCRAE, *Petitioners*

VS.

ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD of the STATE OF CALIFORNIA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI
to the Supreme Court of the State of California

Petitioners Philip Joseph Maita and John McRae pray that a writ of certiorari issue to review the judgment of the Supreme Court of the State of California.

OPINION BELOW

The decision of respondent Alcoholic Beverage Control Appeals Board (In the Matter of the Accusation against Philip Maita and John McRae, AB-3588) is set forth in Appendix A.

The order of the Court of Appeal denying the Petition for Writ of Review (Philip Joseph Maita, et al. vs. Alcoholic Beverage Control Appeals Board, No. 31878) is set forth in Appendix B.

The order of the California Supreme Court denying the Petition for Hearing (Maita et al. vs. Alcoholic Beverage Control Appeals Board, 1 Civ. No. 31878) is set forth in Appendix C.

JURISDICTION

The order of the California Supreme Court denying petitioners' Petition for Hearing was entered September 7, 1972.

The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. Section 1257(3).

QUESTIONS PRESENTED

One

Did the State of California abridge petitioners' right to freedom of speech by revoking their liquor license because petitioners exhibited certain non-obscene films to adult audiences?

Two

Does a conviction for disseminating obscene matter, in the absence of any aggravating circumstances, constitute conduct involving "moral turpitude," and does

an answer in the affirmative have a chilling effect upon the free exercise of First Amendment rights?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The First Amendment to the Constitution of the United States, as follows:

First Amendment:

> "Congress shall make no law . . . abridging the freedom of speech . . ."

California Constitution, Article 20, Section 22, as follows:

> ". . . The Department of Alcoholic Beverage Control shall have the exclusive power . . . to license the manufacture, importation and sale of alcoholic beverages in this State, and to collect license fees or occupation taxes on account thereof. The department shall have the power, in its discretion, to deny, suspend or revoke any specific alcoholic beverages license if it shall determine for good cause that the granting or continuance of such license would be contrary to public welfare and morals, or that a person seeking or holding a license has violated any law prohibiting conduct involving moral turpitude... The Alcoholic Beverage Control Appeals Board shall consist of three members appointed by the Governor . . .
>
> "When any person aggrieved thereby appeals from a decision of the department ordering any penalty assessment, issuing, denying, transfer-

ring, suspending or revoking any license for the . . . sale of alcoholic beverages, the board shall review the decision subject to such limitations as may be imposed by the Legislature . . ."

California Penal Code Section 311.2, as follows:

"(a) Every person who knowingly sends or causes to be sent, or brings or causes to be brought, into this state for sale or distribution, or in this state possesses, prepares, publishes, or prints, with intent to distribute or to exhibit to others, or who offers to distribute, distributes, or exhibits to others, any obscene matter is guilty of a misdemeanor."

STATEMENT OF FACTS

Petitioners Philip Joseph Maita and John McRae have for several years operated a bar in San Mateo, California. In addition to alcoholic beverages, the "Easy Street," as the premises are called, offers entertainment to its patrons. Petitioners were licensed by the State of California to sell alcoholic beverages to adult patrons.

On December 10, 1970, the Department of Alcoholic Beverage Control revoked petitioners' alcoholic beverage license. The purported reasons for the revocation are set forth in the decision of the Alcoholic Beverage Control Appeals Board (see Appendix A).

On July 8, 1972, the Alcoholic Beverage Control Appeals Board upheld the license revocation upon two grounds: first, that the exhibition of certain films on the licensed premises constituted conduct detri-

mental to public welfare and morals, and second, that co-licensee Maita's two prior convictions for violating California obscenity statutes rendered him unfit to retain his alcoholic beverage license.

Petitioners sought relief in the California Court of Appeal, but their Petition for Writ of Review was denied on August 10, 1972.

The California Supreme Court declined to review the decision of the Alcoholic Beverage Control Appeals Board on September 7, 1972.

Thereafter, on October 2, 1972, the Honorable William O. Douglas, Associate Justice of the United States Supreme Court, refused to stay the revocation of petitioners' alcoholic beverage license pending the filing and adjudication of a petition for writ of certiorari in the United States Supreme Court (No. A-313).

REASONS FOR GRANTING THE PETITION

AS TO QUESTION ONE

DID THE STATE OF CALIFORNIA ABRIDGE PETITIONERS' RIGHT TO FREEDOM OF SPEECH BY REVOKING THEIR LIQUOR LICENSE BECAUSE PETITIONERS EXHIBITED CERTAIN NON-OBSCENE FILMS TO ADULT AUDIENCES?

Argument

As the decision of the Alcoholic Beverage Control Appeals Board (see Appendix A) makes clear, petitioners' license was revoked in large measure as punishment for the exhibition of certain films to an adult audience. Petitioners contend that this action vio-

lates rights secured to them by the First Amendment.

Motion picture films which are not obscene are protected by the First Amendment. *Burstyn v. Wilson,* 343 U.S. 495, 502, 96 L.Ed. 1098, 1106, 72 S.Ct. (1952); *Interstate Circuit v. Dallas,* 390 U.S. 676, 20 L.Ed.2d 225, 88 S.Ct. 1298, and the *presumption* of constitutionality applies to films just as it does to printed matter. *Freedman v. Maryland,* 380 U.S. 51, 13 L.Ed.2d 649, 85 S.Ct. 734 (1965). Accordingly, films remain "protected speech" until and unless they are determined to contain the constituent elements of obscenity. *Memoirs v. Massachusetts,* 383 U.S. 413, 418, 16 L.Ed.2d 1, 5, 86 S.Ct. 975 (1966).

The films in question here were not obscene. At the administrative hearing, petitioners offered to prove that they were not obscene, although the burden of establishing obscenity rested with the State of California. Petitioners' offer of proof was rejected as "irrelevant." In point of fact, then, petitioners were subjected to heavy financial punishment because they displayed films whose status as constitutionally protected matter has never been challenged.

That the penalties inflicted upon petitioners were administrative and financial rather than criminal is irrelevant. It has long been the law that licensing statutes may not be used to chill the free exercise of First Amendment rights. *Interstate Circuit v. Dallas, supra; Schneider v. Town of Irvington,* 308 U.S. 147, 84 L.Ed. 155, 59 S.Ct. 774 (1949); *Shuttlesworth v.*

Birmingham, 394 U.S. 147, 22 L.Ed.2d 162, 89 S.Ct. 935 (1970). What this Court prohibited by the cases above cited is precisely what happened here.

AS TO QUESTION TWO

DOES A CONVICTION FOR DISSEMINATING OBSCENE MATTER, IN THE ABSENCE OF ANY AGGRAVATING CIRCUMSTANCES, CONSTITUTE CONDUCT INVOLVING "MORAL TURPITUDE," AND DOES AN ANSWER IN THE AFFIRMATIVE HAVE A CHILLING EFFECT UPON THE FREE EXERCISE OF FIRST AMENDMENT RIGHTS?

Argument

A secondary reason for the revocation of petitioners' alcoholic beverage license was the prior plea of guilty to two counts of violating California's basic obscenity statute by co-licensee Philip Maita. None of the facts or circumstances of these misdemeanor violations were considered relevant by respondent Alcoholic Beverage Control Appeals Board.

It is well recognized that obscenity is separated from constitutionally protected expression by only a "dim and uncertain line." *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 66, 9 L.Ed.2d 584, 83 S.Ct. 631. The State of California has inflicted an enormously burdensome penalty upon petitioners for the fact that co-licensee Maita strayed over that line. To establish such penalties for venturing over the "dim and uncertain line" is to chill the free and uninhibited exercise of First Amendment freedoms.

CONCLUSION

For the reasons hereinabove stated, it is respectfully submitted that this petition for Writ of Certiorari be granted.

Dated, San Jose, California,
December 1, 1972.

DONALD A. TENENBAUM,
Attorney for Petitioners.

(Appendices Follow)

Appendix A

Before the Alcoholic Beverage Control Appeals Board
of the State of California

AB-3588
File No. 4541; Reg. No. 8609; H/O: Coan

In the Matter of the Accusation against

Philip Maita and John McRae
dba Easy Street (Fireside)
2322 El Camino Real
San Mateo, California
Respondents and Licensees

under the Alcoholic Beverage
Control Act.

[JULY 18, 1972]

Time & Place of Hearing:
December 1, 1971, @ 9:30 a.m.
World Trade Center
San Francisco, California

For Department:
Honorable Evelle J. Younger
Attorney General

L. Stephen Porter
Deputy Attorney General

For Appellants:
Allen Ruby, Esq.

Appellants Philip Maita and John McRae, doing business as Easy Street, under the provisions of sec-

tion 23084 of the Business and Professions Code, seek review of a decision of the Department of Alcoholic Beverage Control which determined that continuance of appellants' license would be contrary to public welfare or morals and that grounds for suspension or revocation of said license existed within the meaning of article XX, section 22 of the State Constitution and section 24200(a) of the Business and Professions Code as to counts I and II and, in addition to the foregoing pursuant to section 24200(d) of the Business and Professions Code as to count III of the accusation. As a penalty, appellants' license was ordered revoked as to counts I, II and II, separately and severally.

The department's decision contains the following:

"FINDINGS OF FACT:

"COUNT I

"It is true that the above licensee did permit, allow and suffer the hereinafter described motion picture films to be exhibited on said licensed premises:

"(a) April 30, 1969: One reel, depicting a Caucasian male and female engaging in sexual activity including, but not limited to, kissing breasts, inner thighs, tongues, fellatio, and intercourse. Also depicting a Caucasian male simulating intercourse with a Caucasian female.

"The second paragraph of this subcount was stricken on motion of the Department."

"(b) April 30, 1969: One reel, depicting two Caucasian females engaging in sexual activity in-

cluding but not limited to, kissing, touching tongues, rubbing pubic areas against each other.

"A portion of this subcount was stricken on motion of the Department.

"(c) and (d) Subcounts c. and d. were stricken on motion of the Department.

"(e) May 2, 1969: One reel of film depicting two Caucasian females engaged in simulated sexual activity, including but not limited to kissing, fondling each other's bodies, and cunnilingus.

"(f) May 3, 1969: One reel of film depicting a Caucasian male and female engaged in sexual activity including, but not limited to, kissing, fondling, intercourse, masturbation and fellatio.

"(g) May 7, 1969: One reel of film depicting two Caucasian females engaged in sexual activity including, but not limited to, kissing, fondling and sucking of the breasts.

"One reel of film depicting two Caucasian females engaged in sexual activity including, but not limited to, kissing and fondling of the mouth, legs and sucking of the breasts.

"(h) May 13, 1969: One reel of film depicting a Caucasian female engaging in sexual activity including, but not limited to, simulating sexual intercourse and cunnilingus using a 'Teddy' bear.

"One reel of film, entitled 'Bride and Groom' depicting a Caucasian male and female engaging in sexual activity including but not limited to, simulating fellatio and cunnilingus.

"(i) May 14, 1969: The description of both reels of film as set forth in subcount h. above is

incorporated herein as though fully set forth and repleaded.

"(j) May 15, 1969: The description of both reels of film as set forth in subcount h. above is incorporated herein as though fully set forth and repleaded.

"(k) May 16, 1969: The description of both reels of film as set forth in subcount h. above is incorporated herein as though fully set forth and repleaded.

"(l) May 17, 1969: The description of both reels of film as set forth in subcount h. above is incorporated herein as though fully set forth and repleaded.

"(m) May 20, 1969: One reel of film depicting two Caucasian females, one Caucasian male and one Negro male engaging in sexual activity including, but not limited to, fondling and kissing each other and simulated fellatio by the Caucasian male upon the Negro male.

"One reel of film depicting a Caucasian male and female engaging in sexual activity including, but not limited to, embracing, fondling and kissing each other's bodies.

"(n) May 22, 1969: One reel of film depicting a Caucasian male and female engaging in sexual activity including, but not limited to, kissing, fondling and simulating cunnilingus.

"The description of the first reel of film as set forth in subcount m. above is incorporated herein as though fully set forth and repleaded.

"(o) May 23, 1969: The description of both reels of film as set forth in subcount m. is incor-

porated herein as though fully set forth and repleaded.

"(p) May 24, 1969: The description of both reels of film as set forth in subcount m. above is incorporated herein as though fully set forth and repleaded.

"SPECIAL FINDINGS RE COUNT I

"The above-described motion pictures *did not* in fact show actual fellatio, cunnilingus, intercourse and masturbation because of the camera angles used which prevented a direct view, but the observer was left with the impression that such activity was actually being engaged in. In some of these motion pictures, the men's sexual organs and the women's vulva and pubic area were clearly visible.

"COUNT II

"It is true that the above named licensee did permit, allow and suffer the following behavior on the licensed premises:

"(a) On or about April 30, 1969, a female employee, hereinafter described, did touch the shoulder of Special Investigator E. K. Cooper with her bare breast.

"Waitress: 'Doris'; Caucasian; female; 23 years of age; 5'6"; 125 pounds; dark brown hair; wearing blue bikini briefs; otherwise nude.

"(b) On or about April 30, 1969, a male patron did, during the exhibition of the first reel of film as described in subcount m. of Count I, squeeze his genital area.

"(c) On or about April 30, 1969, a female employee, hereinafter described, did appear completely nude, thereby exposing her pubic area and bare breasts to the patrons there assembled.

"Female employee: Caucasian; female; 23 years of age; 5'4"; 115 pounds; brown hair; wearing pearl earrings and yellow shoes, otherwise nude.

"(d) No evidence was introduced in support of this subparagraph and its is therefore found to be not true.

"(e) On or about May 2, 1969, in the above mentioned premises, a female employee, hereinafter described, did expose her pubic area to the patrons there assembled.

"Female employee: Caucasian; female, 23 years of age; 5'4"; 115 pounds; brown hair; wearing pearl earrings and yellow shoes, otherwise nude.

"(f) On or about May 3, 1969, in the above mentioned premises, a female employee, hereinafter described, did expose her pubic area to the patrons there assembled.

"Female employee: Caucasian; female; 23 years of age; 5'4"; 115 pounds; brown hair; wearing pearl earrings and yellow shoes; otherwise nude.

"(g) On or about May 5, 1969, in the above mentioned premises, a female employee, hereinafter described, did expose her pubic area to the patrons there assembled.

"Female employee: Caucasian; female; 23 years of age; 5'4"; 115 pounds; brown hair; wearing a

gold chain on her wrist and black shoes, otherwise nude.

"(h) On or about May 7, 1969, in the above mentioned premises, a female employee, hereinafter described, did expose her pubic area to the patrons there assembled.

"Female employee: Caucasian; female; 23 years of age; 5'4"; 115 pounds; brown hair; wearing a gold bracelet and black shoes; otherwise nude.

"(i) On or about May 9, 1969, in the above-mentioned premises, a female employee, hereinafter described, did expose her pubic area to the patrons there assembled.

"Female employee: Caucasian; 23 years of age; 5'4"; 115 pounds; brown hair; black shoes; otherwise nude.

"(j) On or about May 10, 1969, in the above mentioned premises, a female employee, hereinafter described, did expose her pubic area to the patrons there assembled.

"Female employee: Caucasian; 23 years of age; 5'4"; 115 pounds; brown hair; white shoes; otherwise nude.

"(k) On or about May 13, 1969, in the above mentioned premises, a female employee, hereinafter described, did expose her pubic area to the patrons there assembled.

"Female employee: 'Blanca'; Caucasian; 23 years of age; 5'4"; 115 pounds; brown hair; wearing black shoes; otherwise nude.

"(l) On or about May 16, 1969, in the above mentioned premises, a female employee, herein-

after described, did expose her pubic area to the patrons there assembled.

"Female employee: 'Blanca'; Caucasian; 23 years of age; 5'4"; 115 pounds; brown hair; wearing black shoes, otherwise nude.

"(m) On or about May 17, 1969, in the above mentioned premises, a female employee, hereinafter described, did expose her pubic area to the patrons there assembled.

"Female employee: 'Blanca'; Caucasian; 23 years of age; 5'4"; 115 pounds; brown hair; wearing black shoes; otherwise nude.

"(n) On or about May 20, 1969, in the above mentioned premises, a female employee, hereinafter described, did expose her pubic area to the patrons there assembled.

"Female employee: Caucasian; 22 years of age; 5'7"; 125 pounds; brown hair; wearing brown calf length boots; otherwise nude.

"(o) On or about May 22, 1969, female employees hereinafter described, in the course of their employment as cocktail waitresses, did expose their bare breasts and pubic areas to the persons there assembled.

"Waitress #1: 'Joanne'; Caucasian; female; 22 years of age; 5'6"; 120 pounds; brown hair; completely nude except for sandals.

"Waitress #2: 'Helen'; Caucasian; female; 22 years of age; 5'5"; 115 pounds; brown hair; completely nude except for tan moccasins.

"(p) On or about May 23, 1969, female employees hereinafter described, in the course of their employment as cocktail waitresses, did ex-

pose their breasts and pubic area to persons there assembled.

"Waitress #1: 'Joanne'; Caucasian; female; 22 years of age; 5'6"; 120 pounds; dark brown hair; completely nude except for sandals.

"Waitress #2: 'Helen'; Caucasian; female; 22 years of age; 5'5"; 115 pounds; brown hair; completely nude except for tan moccasins.

"Waitress #3: 'Patty'; (also known as Mary Jane); Caucasian; female; 22 years of age; 5'6"; 120 pounds; dark blond hair; completely nude except for black shoes.

"(q) On or about May 24, 1969, female employees hereinafter described, in the course of their employment as cocktail waitresses, did expose their breasts and pubic areas to persons there assembled.

"Waitress #1: 'Joanne'; Caucasian; female; 22 years of age; 5'6"; 120 pounds; dark brown hair; completely nude except for sandals.

"Waitress #2: 'Helen'; Caucasian; female; 22 years of age; 5'4"; 115 pounds; brown hair; completely nude except for tan moccasins.

"(r) On or about May 24, 1969, female employees, hereinafter described, did appear completely nude, thereby exposing their pubic areas and bare breasts to the patrons there assembled.

"Employee #1: 'Joanne'; Caucasian; female; 22 years of age; 5'6"; 120 pounds, dark brown hair; wearing brown sandals; otherwise nude.

"Employee #2: 'Patty' (also known as Mary Jane); Caucasian; female; 22 years of age;

5'6"; 125 pounds; dark blond hair; wearing black shoes and eyeglasses, otherwise nude.

"(s) Subcount s. was stricken on motion of the Department.

"SPECIAL FINDINGS RE COUNT II:

"Each of the above described women wore a *device* covering their pubic and anal areas. It was so designed to give the appearance that they were not so covered.

"COUNT III

"Co-licensee Philip J. Maita is an unfit and unqualified person to hold an alcoholic beverage license in that on or about July 7, 1970, said Maita did plead guilty to two separate complaints, each alleging a violation of Penal Code Section 311.2, knowingly exhibiting obscene films, and was convicted thereby, both crimes involving moral turpitude. Maita was fined and paid $1,000.00 plus $250.00 penalty assessment in one case, and a $500.00 fine plus a $125 penalty assessment in the other case. Approximately 100 other similar charges were dismissed by the Court.

"DETERMINATIONS OF ISSUES PRESENTED:

"I

"Continuance of the above described license would be contrary to public welfare and morals and grounds for suspension or revocation of said license exist within the meaning of Article XX, Section 22, State Constitution, and Section 24200

(a), Business and Professions Code, on the facts found in Counts I and II.

"II

"Continuance of the above described license would be contrary to public welfare and morals and grounds for suspension or revocation of said license exist within the meaning of Article XX, Section 22, State Constitution, and Sections 24200 (a) and (d), Business and Professions Code, on the facts found in Count III."

Appellants do not seriously contest the findings of fact as set forth in the department's decision. At the administrative hearing it was agreed by the parties that the evidence presented with respect to counts I and II would consist of reading into the record statements that various department investigators recorded in their field reports at the time they were in the premises and observed movies and/or nude female employees. (R.T. 14.) The department also introduced into evidence a copy of the accusation (exhibit 1), a diagram of the premises (exhibit 2) and certified copies of proceedings in the Municipal Court, Central Judicial District, County of San Mateo, People v. Philip Joseph Maita, Nos. M-20721 and M-21076 (exhibits 3 and 4).

Co-licensee Philip Maita testified that during the period covered by the department's accusation he was almost continuously in the licensed premises; he described the premises, the location of the stage and screen and described the general type of lighting

installed in the premises; he testified that there was no lighting within the audience area of the premises either on the tables or overhead. (R.T. 43.) Mr. Maita testified that the nude employees always wore a patch covering their pubic area. A sketch of the patch was introduced into evidence (exhibit A). Mr. Maita also discussed his arrest and convictions involving violations of section 311.2 of the California Penal Code.

In argument, appellants contend that the findings do not support the department's decision; that a licensee may not be disciplined for the acts and conduct set forth in counts I and II unless it proved that such acts and conduct are obscene; that both films and nude entertainment are protected by the First Amendment of the United States Constitution; that the decision of the department as to count III is not supported by the findings of fact; that the hearing officer improperly excluded crucial evidence offered by appellants and that convictions of Penal Code section 311.2 for willfully exhibiting obscene films are not convictions of crimes involving moral turpitude.

In response, the department argues that the acts and conduct set forth in counts I and II constitute grounds for discipline; that the non-verbal acts and conduct set forth in counts I and II are not within the First Amendment sphere; that a conviction of section 311.2 of the Penal Code constitutes clear and ample grounds for revocation of appellants' license; and that the hearing officer ruled properly in sustaining objections to the introduction of testimony by

experts as to whether the conduct on the licensed premises was lewd or obscene.

With respect to count I, it is to be noted that the films which were shown on the licensed premises and viewed by the department investigators were destroyed based upon an order of the Municipal Court, Central Judicial District, County of San Mateo. (R.T. 7.) In our opinion, the description of the contents of the films as set forth in the investigators field reports, even though considered secondary evidence, constitutes substantial evidence supportive of the department's findings.

Count II of the department's decision contains 17 subcounts. Fifteen of the 17 subcounts involve nude female employees who were working in the premises as cocktail waitresses and during the course of their employment exposed their bare breasts and pubic area to the patrons assembled in the premises. The basic question as to whether the department can discipline licensees for permitting nude female employees to work in licensed premises is somewhat unsettled. This board in recent cases coming before it involving nude performers or employees has stated that in the absence of departmental rules or regulations, and without some additional improper conduct on the part of the patrons or agents, nudity alone would not create conditions contrary to public welfare or morals. (*In re Giannini*, et al, 69 Cal.2d 563, 72 Cal.Rptr. 655 (1968); *Boreta Enterprises, Inc. v. Dept. of Alcoholic Bev. Control*, 2 Cal.3d 85.) In the *Boreta* case the

court stated that the crucial question before the court was whether the conduct of the dancers or entertainers, without any evidence of improper conduct on their part toward the patrons or of the effect their presence, had on the behavior of the patrons constituted "good cause" for the revocation of a license under article XX, section 22 and/or section 24200(a) as conduct contrary to public welfare or morals. It is our opinion that the 15 subcounts which involve nudity of female employees do not reflect conduct which subjects appellants' license to disciplinary action and, in our opinion, the findings do not support the department's decision. As to subcounts (a) and (b) of count II, the evidence presented is not, in our opinion, sufficient to support a finding that the conduct complained of is contrary to public morals. In view of the foregoing, we reverse count II.

Count III presents no particular problem. Colicensee Philip Maita plead guilty to and was convicted of violations of Penal Code section 311.2 for willfully exhibiting obscene films at the licensed premises. Mr. Maita has been convicted of a crime concerning conduct involving moral turpitude. The violation of any law prohibiting conduct involving moral turpitude is a sufficient basis for the imposition of sanctions by the department. (Section 24200 (d), Business and Professions Code.) The department here ordered revocation of appellants' license. We cannot say that such an order constitutes an abuse of discretion as a matter of law.

In view of the foregoing, this board affirms counts I and III and reverses count II. As separate penalties of revocation have been imposed as to each count, there is no need to remand this matter to the department for further proceedings. (*Mast v. State Bd. of Optometry*, 139 Cal.App.2d 78, 293 P.2d 148.)

Hugh M. Burns, Chairman
Alcoholic Beverage Control Appeals Board

We Concur:
Eugene V. Lipp
Kay Valory

Sacramento, California
July 17, 1972

Appendix B

In the Court of Appeal
State of California
First Appellate Court

DIVISION FOUR

No. 31878

Philip Joseph Maita, et al.,
Petitioners,

vs.

Alcoholic Beverage Control Appeals Board, et al.,
Respondents.

[Filed August 10, 1972]

BY THE COURT:

The petition for a writ of review is denied.

Dated Aug 10 1972

Ratigan,
Acting P.J.

Appendix C

Clerk's office, Supreme Court
4250 State Building
San Francisco, California, 94102
Sep 7 1972

Dear Sir: I have this day filed Order
Hearing Denied

In re: 1 Civ. No. 31878
Maita
vs.
ABC Appeals Board

Respectfully,

G. E. Bishel
Clerk

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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-800

PHILIP JOSEPH MAITA AND JOHN McRAE,
Petitioners,

VS.

ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD OF THE STATE OF CALIFORNIA,
Respondent.

Brief in Opposition to Petition for Writ of Certiorari

OPINION BELOW

The final order of the Alcoholic Beverage Control Appeals Board of the State of California affirming the decision of the Department of Alcoholic Beverage Control of the State of California is contained in the Appendix to the Petition for a Writ of Certiorari. (See Appendix "A", Petition for a Writ of Certiorari).

The California Court of Appeal denied petitioners' petition for a writ of review (certiorari) on August 10, 1972, without opinion. (See Appendix "B", Petition for a Writ of Certiorari).

The California Supreme Court denied petitioners' petition for a hearing on September 7, 1972, without opinion (See Appendix "C", Petition for a Writ of Certiorari).

JURISDICTION

The jurisdiction of this Court is invoked under the provisions of section 1257(3) of Title 28, United States Code.

QUESTIONS PRESENTED

Does the First Amendment bar the State of California from revoking the liquor license of an alcoholic beverage licensee who has been convicted, upon his pleas of guilty, of two violations of California Penal Code Section 311.2 for willfully exhibiting obscene films on the licensed alcoholic beverages premises?

Does the First Amendment bar the State of California from revoking the liquor license of a licensee who, contrary to the public welfare and morals, has exhibited explicit, sexually-oriented films on his state licensed on-sale alcoholic beverages premises?

STATUTES INVOLVED

The statutes involved are Article XX, Section 22 of the California Constitution; sections 24200(a) and 24200(d) of the California Alcoholic Beverage Control Act; and section 311.2 of the California Penal Code. The pertinent provisions of the aforesaid constitutional provision and statutes are:

California Constitution, Article XX, Section 22

"The Department of Alcoholic Beverage Control shall have the exclusive power, except as herein provided and in accordance with laws enacted by the Legislature, to license the manufacture, importation and sale of alcoholic beverages in this State, and to collect license fees or occupation taxes on account thereof. *The department shall have the power, in its discretion, to deny, suspend or revoke any specific alcoholic beverages license if it shall determine for good cause that*

the granting or continuance of such license would be contrary to public welfare or morals, or that a person seeking or holding a license has violated any law prohibiting conduct involving moral turpitude." (Emphasis added)

California Alcoholic Beverage Control Act, Sections 24200 (a) and 24200 (d)

"§ 24200. The following are the grounds which constitute a basis for the suspension or the revocation of licenses:

(a) When the continuance of a license would be contrary to public welfare or morals; but proceedings under this section upon this ground are not a limitation upon the department's authority to proceed under Article XX, Section 22, of the Constitution.

• • • • •

(d) The plea, verdict, or judgment of guilty to any public offense involving moral turpitude or . . ."

California Penal Code, Section 311.2

"(a) Every person who knowingly sends or causes to be sent, or brings or causes to be brought, into this state for sale or distribution, or in this state possesses, prepares, publishes, or prints, with intent to distribute or to exhibit to others, or who offers to distribute, distributes, or exhibits to others, any obscene matter is guilty of a misdemeanor."

STATEMENT OF THE CASE

The petitioners-licensees exhibited certain films on their state licensed alcoholic beverages premises which depicted various explicit sexual activities between persons of both sexes and between persons of the same sex. Concurrent

with an alcoholic beverages control investigation of the activities occurring on the licensed premises, the co-petitioner-licensee Maita was arrested for violations of California Penal Code section 311.2 (willfully exhibiting obscene films) and the films were seized. The films were subsequently ordered destroyed by the state criminal court following co-petitioner-licensee Maita's convictions—upon his pleas of guilty—for violations of California Penal Code section 311.2 (willfully exhibiting obscene films).

An accusation was filed with the California Department of Alcoholic Beverage Control (hereinafter referred to as the Department) against petitioners' on-sale alcoholic beverages license. The accusation was pled in two counts. Count I alleged in numerous subcounts that the petitioners-licensees had permitted films to be exhibited on the licensed alcoholic beverages premises which depicted various types of explicit sexual activity between persons of both sexes and between persons of the same sex. Count II alleged in numerous subcounts that the petitioners-licensees had permitted certain behavior on the licensed alcoholic beverages premises and had employed nude cocktail waitresses and dancers.

Following the criminal convictions of co-petitioner-licensee Maita for violations of California Penal Code Section 311.2, the accusation was amended to allege as Count III that co-petitioner-licensee Maita had pled guilty to, and had been convicted of, violations of California Penal Code section 311.2 (willfully exhibiting obscene films).

Thereafter, an adjudicatory hearing was held on the accusation before the Department[1]. The Department's Deci-

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1. The California Department of Alcoholic Beverage Control is a California state court of limited jurisdiction. Calif. Constitution, Art. XX, Sec. 22; Francisco Enterprises v. Kirby, Director of the Dept. of Alcoholic Beverage Control, ... F. Supp. ..... (U.S.D.C., Northern Dist. Calif. 1971); Martin v. Alcoholic Beverage Control Appeals Board, 52 Cal.2d 238 (1959); Covert v. State Board of Equalization, 29 Cal.2d 125, 131, 173 P.2d 545 (1946).

sion found the allegations of the accusation to be true—save and except for two subcounts of both Counts I and II—and provided for the revocation of petitioners' alcoholic beverages license separately and severally as to each count.

The petitioners-licensees filed an appeal with the California Alcoholic Beverage Control Appeals Board (hereinafter referred to as the Appeals Board), an appellate tribunal established by the California Constitution to review adjudicatory decisions of the Department. California Constitution, Article XX, Section 22.

After receiving written and oral argument, the Appeals Board filed its final order wherein it affirmed the Department's decision as to Counts I and III, and reversed the Department's decision as to Count II. (See Appendix "A", Petition for Writ of Certiorari).

The petitioners-licensees then filed a petition for a writ review (certiorari) in the California Court of Appeal. The Court of Appeal denied the petition. (See Appendix "B", Petition for Writ of Certiorari). The petitioners-licensees then sought a hearing in the California Supreme Court which denied their petition (See Appendix "C", Petition for Writ of Certiorari)

ARGUMENT

I. The Criminal Convictions—Upon Co-Petitioner Maita's Guilty Pleas—for California Penal Code Section 311.2 Violations (Willfully Exhibiting Obscene Films) Constitute Grounds for Alcoholic Beverages License Discipline Under the California Constitution and Under California Alcoholic Beverage Control Act Sections 24200(a) and 24200(d). Such Convictions Fully Support the Revocation Order Separately Imposed on Petitioners' Alcoholic Beverages License for Count III.

As a result of the films being shown on the licensed premises, co-licensee Maita was arrested and was convicted—upon his pleas of guilty—to violations of Penal Code

section 311.2 (willfully exhibiting obscene films). Said convictions were alleged and found to be true under Count III of the Department's decision. The Department found that the convictions constituted grounds for license discipline under Article XX, Section 22 of the California Constitution, and under Sections 24200(a) and 24200(d) of the Alcoholic Beverage Control Act. The license discipline imposed for Count III was revocation.

The California Constitution, Article XX, Section 22, provides in pertinent part:

> ". . . The Department shall have the power, in its discretion, to deny, suspend or revoke any specific alcoholic beverages license if it shall determine for good cause that the granting or continuance of such license would be contrary to public welfare or morals, or that a person seeking or holding a license has violated any law prohibiting conduct involving moral turpitude."

Alcoholic Beverage Control Act, Section 24220, subdivision (a) provides (Div. 9, Calif. Bus. & Prof. Code):

> "The following are the grounds which constitute a basis for the suspension or the revocation of licenses:
>
> "(a) When the continuance of a license would be contrary to public welfare or morals; but proceedings under this section upon this ground are not a limitation upon the department's authority to proceed under Article XX, Section 22, of the Constitution."

And finally, Alcoholic Beverage Control Act, Section 24200, subdivsion (d), provides:

> "The following are the grounds which constitute a basis for the suspension or the revocation of licenses:
>
> "(d) The plea, verdict, or judgment of guilty to any public offense involving moral turpitude. . . ."

Co-licensee Maita pled guilty to, and was convicted of, violations of Penal Code Section 311.2 for willfully exhibiting obscene films.

As set forth in *Otash v. Bureau of Private Investigators,* 230 Cal.App.2d 568, 571 (1964), hearing by California Supreme Court denied: "Moral turpitude, broadly defined, is any conduct which is contrary to justice, honesty and good morals." And see *In re Boyd,* 48 Cal.2d 69, 70 (1957).

Penal Code Section 311, subdivision (a), defines "obscene" as that term is used in Section 311.2 (of which co-licensee Maita pled guilty to and was convicted) as follows:

> "(a) 'Obscene' means that to the average person, applying contemporary standards, the predominant appeal of the matter, taken as a whole, is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion, which goes substantially beyond customary limits of candor in description or representation of such matters and is matter which is utterly without redeeming social importance."

Convictions for willfully exhibiting obscene films are both and severally: (1) convictions for public offenses involving moral turpitude per se, and (2) conduct by the licensee contrary to public welfare and morals. The revocation of petitioners' license under Count III was proper and did not constitute a clear abuse of discretion. California Constitution, Article XX, Section 22; Alcoholic Beverage Control Act, Section 24200, subdivisions (a) and (d); *Macfarlane v. Dept. of Alcoholic Beverage Control,* 51 Cal.2d 84, 91 (1958); *Martin v. ABC Appeals Board & Haley,* 52 Cal. 2d 287, 291, 293 (1959).

II. The Department of Alcoholic Beverage Control May Discipline an Alcoholic Beverages License for Activities Contrary to Public Welfare and Morals. Obscenity Was Not a Required Element of Proof as to Count I. California v. LaRue, ... U.S. (Dec. 5, 1972)

Under Count I of the Department's decision it was found that the licensees had permitted the exhibiting of various

films on the licensed alcoholic beverages premises which depicted explicit sexual activities between persons of both sexes and between persons of the same sex, and that such activities on the licensed premises were contrary to the public welfare and morals. The petitioners' alcoholic beverages license was separately revoked for Count I.

Petitioners assert that their alcoholic beverages license may not be disciplined for the exhibiting of films on state licensed alcoholic beverages premises without proof that the films were obscene. Such a contention rests upon the petitioners' basic premise that explicit sexual activity constitutes "expression" and is protected by the First Amendment unless proved to be obscene.

That a state may regulate such activity on licensed alcoholic beverages premises without proof of obscenity was recently upheld by this Honorable Court in *California v. LaRue,* ..... U.S. ....., October Term, 1971, No. 71-36 (December 5, 1972). And see United States Constitution, Twenty-first Amendment.

In *Vallerga v. Dept. of Alcoholic Beverage Control,* 53 Cal.2d 313, 319 (1959), the California Supreme Court observed:

> ". . . . 'There are many things that can be done in the privacy of the home which may not be illegal, but if done in a public tavern are directly offensive to public morals and decency, ... The continuance of the license under such circumstances "would be contrary to public welfare or morals" as provided in our Constitution. . . ."

and then the California Supreme Court held:

> "Conduct which may fall short of aggressive and uninhibited participation in fulfilling the sexual urges of homosexuals, reported in some instances (see *Ker-*

shaw v. Dept. of Alcoholic Beverage Control, supra, 155 Cal.App.2d 544, 547-548), may nevertheless offend good morals and decency by displays in public which do no more than manifest such urges. This is not to say that homosexuals might properly be held to a higher degree of moral conduct than are heterosexuals. *But any public display which manifests sexual desires, whether they be heterosexual or homosexual in nature may, and historically have been, suppressed and regulated in a moral society."*

It is important to note, that even should this Honorable Court find merit as to petitioners' contentions as to Count I, that revocation of petitioners' license was imposed separately and independently for Count III. Any reversal of the Department's decision as to Count I would not affect the revocation independently imposed for Count III.

CONCLUSION

Petitioners' alcoholic beverages license was revoked separately and severally for petitioners exhibiting explicit sexual films on their licensed alcoholic beverages premises (Count I) and for petitioner Maita's criminal convictions —upon his pleas of guilty—for willfully exhibiting obscene films on the licensed premises (Count III).

Such activities and convictions involving state licensed alcoholic beverages premises constitute clear grounds for the revocation of petitioners' alcoholic beverages license under the California Constitution and under the California Alcoholic Beverage Control Act.

The petition for a writ of certiorari should be denied United States Constitution, Twenty-first Amendment; *California v. LaRue,* ..... U.S. ..... (1972).

Respectfully submitted,

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